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Duane Langenwaller

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EXAMINER

FERGUSON, MICHAEL P

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The time period for reply, if any, is set in the attached communication.

1 RECORD OF ORAL HEARING

2
3 UNITED STATES PATENT AND TRADEMARK OFFICE

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5
6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES

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10 Ex parte DUANE LANGENWALTER

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13 Appeal 2009-004466
14 Application 10/797,410
15 Technology Center 3600

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18 Oral Hearing Held: October 20, 2009

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23 Before JENNIFER BAHR, KEN B. BARRETT, FRED A. SILVERBERG,
24 Administrative Patent Judges

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26 ON BEHALF OF THE APPELLANT:

27
28 James W. Edmondson, Esq.
29 Finnegan, Henderson, Farabow,
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2 The above-entitled matter came on for hearing on Tuesday, October
3 20, 2009, commencing at 1:47 p.m., at the U.S. Patent and Trademark
4 Office, 600 Dulany Street, East Wing, 9th Floor, Hearing Room A,
5 Alexandria, Virginia, before Jan Jablonsky, Notary Public, in and for the
6 Commonwealth of Virginia.

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8 P R O C E E D I N G S
9

10 JUDGE BAHR: Good afternoon, Mr. Edmondson.

11 MR. EDMONDSON: Good afternoon, ma'am.

12 JUDGE BAHR: This is Appeal Number 2009-004466 and
13 application 10/797,410?

14 MR. EDMONDSON: Yes, ma'am.

15 JUDGE BAHR: You can get started whenever you're ready.

16 MR. EDMONDSON: Thank you. Your Honors, the invention as set
17 forth in the claims relates to a fencing system; as set forth in claim 1, a
18 plurality of stakes are driven into the ground, each stake having a hollow
19 stake sleeve with an internal diameter. A plurality of posts, have a diameter
20 smaller than the internal diameter of each stake sleeve. Any post slidably,
21 interchangeably inserts and can be frictionally and removably retained by
22 any stake sleeve.

23 As set forth in independent claim 16, at least one stake is driven into
24 the ground and at least one cylindrical post with a diameter smaller than the
25 internal diameter of the stake sleeve is slidably inserted into and frictionally
26 and removably retained by the stake sleeve. These terms, "slidably,

1 frictionally maintained, removable and interchangeable" are the keys to this
2 invention, because they enable the user to drive his stakes into numerous
3 patterns and then set up his fence in an infinite number of possible patterns
4 with angles and so forth as chosen, and withdraw the stakes and put them in
5 another pattern as desired without removing the stakes.

6 The claims have been repeatedly rejected under 102 and 103 under
7 three references. The primary reference, the Carlson reference, is a prior art
8 fence which shows posts in two possible anchors, one of which has a flat
9 bottom and one of which admittedly is a stake. There is no express
10 disclosure in Carlson that the posts are removable, frictionally maintained,
11 slidable into the stake, or interchangeable with other stakes.

12 JUDGE BAHR: So that post in Carlson is item number 1?

13 MR. EDMONDSON: Yes, ma'am, and 5 is the stake. We argue there
14 also is no implied, inherent disclosure in the claim elements. I know the
15 Board knows the law that inherency requires necessity. But there is no
16 necessity in Carlson that that post number 1 be removed from the stake
17 number 5, nor any number of possibilities. Perhaps, the post could have
18 been welded, molded -- could have been forged in place inside of the stake --
19 but there was no necessity that it's removable, frictionally held and
20 interchangeable.

21 Absent necessity there is no inherency. That's simply the law. I'd like
22 to turn to Ravert, another reference relied on by the Examiner. In Ravert, as
23 shown in figure 5, we have a fence that was designed specifically for use
24 around Christmas trees and is to be set up on a platform, such as perhaps a
25 floor or a deck, some type of hard platform. And looking at figure 5, the
26 base is a flange shaped base with a bolt 10 driven upward into the post. The

1 post is not slidably inserted into a stake sleeve. There is no disclosure or
2 necessity that the post be interchangeable with any face and
3 interchangeability would be a riddle anyway, because there is no sliding, no
4 frictional maintenance, or all of the other requirements of the claims.

5 JUDGE BAHR: And, in fact, it doesn't appear the Examiner relies on
6 Ravert for that teaching anyway. It looks like he's relying on Carlson.

7 MR. EDMONDSON: He's relying primarily on Carlson. I agree.
8 Yes, ma'am. Our final reference is Gibbs, which the Examiner primarily
9 relied on for its material composition for dependent claims. Gibbs actually
10 expressly discloses prior art in column 2, lines 15, et seq., where he states
11 that the post is securely anchored at its base into a substrate, such as the
12 ground or underground mass of concrete. Now, this is classic prior art that
13 we see when we have hired a company to build a fence in our own
14 backyards, or see a construction fence at a construction site, the posts
15 pounded into the ground that subsequently have to be pulled out.

16 The inventor's fence, as recited in the claims, which enable the
17 consumer to create any number of potential fence designs without removing
18 the stakes, which is a difficult, time-consuming process, has been a very
19 great commercial success and had a number of other secondary indicia of
20 non-obviousness that were set forth in the Declaration of the president of the
21 Assignee that was attached to our Appeal Brief. The president's name is
22 Paul L. Gossling. He testified in his Declaration that because the posts are
23 easily removable and interchangeable, they've had a large number of sales
24 that increase substantially with each year that the fence was on the market.

25 He testified that there was a long-felt unsolved need, and that they
26 received numerous comments from their distributors and customers

1 indicating that commercial success was very surprising and attributed to its
2 versatility of the removable, interchangeable posts. We believe the Gossling
3 Declaration is just one more indication of the non-obviousness and
4 patentability of this invention.

5 JUDGE BAHR: Any questions? I think we understand your position.
6 I don't have any questions. We'll take this case under advisement.

7 MR. EDMONDSON: Thank you, ma'am.

8 [The hearing was concluded at 1:55 p.m.]